

APPENDIX A



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-85,343-01

EX PARTE NAIM RASOOL MUHAMMAD, Applicant

**ON SUGGESTION TO RECONSIDER APPLICATION FOR POST-
CONVICTION WRIT OF HABEAS CORPUS
FROM CAUSE NO. W11-00698 IN THE 4TH CRIMINAL DISTRICT COURT
DALLAS COUNTY**

Per curiam.

ORDER

We have before us a suggestion for the Court to reconsider on our own initiative Applicant's initial writ of habeas corpus application filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.

In May 2013, a jury convicted Applicant of capital murder for drowning his two young sons. *See* TEX. PENAL CODE § 19.03. The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction

and sentence on direct appeal. *Muhammad v. State*, No. AP-77,021 (Tex. Crim. App. Nov. 4, 2015) (not designated for publication).

In his application, Applicant presented nine challenges to the validity of his conviction and sentence. The trial court held an evidentiary hearing, entered findings of fact and conclusions of law, and recommended that we deny relief.

After reviewing the entire record, we adopted the trial court’s findings of fact and conclusions of law. Based upon the trial court’s findings and conclusions and our own review, we denied relief on Claims 1 and 3 through 9, and dismissed Claim 2. *Ex parte Muhammad*, No. WR-85,343-01 (Tex. Crim. App. Nov. 18, 2020) (not designated for publication). Applicant now asserts that we issued this ruling without the benefit of six volumes of the Reporter’s Record on habeas. Applicant is mistaken. This Court received and reviewed all of the 22 volumes contained in the Reporter’s Record. Applicant’s suggestion that we reconsider our ruling is denied.

IT IS SO ORDERED THIS THE 17TH DAY OF MARCH, 2021.

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APPENDIX B



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-85,343-01

EX PARTE NAIM RASOOL MUHAMMAD, Applicant

**ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS
FROM CAUSE NO. W11-00698 IN THE 4TH CRIMINAL DISTRICT COURT
DALLAS COUNTY**

Per curiam. YEARY and NEWELL, JJ., concurred.

ORDER

This is an application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.¹

¹ Under Article 11.071, § 4(a), an initial writ of habeas corpus “must be filed in the trial court not later than . . . the 45th day after the date the State filed its brief with this Court on direct appeal[.]” Article 11.071 § 4(b) provides that, before the applicable filing date, the convicting court may, for good cause shown, grant one 90-day extension of the filing deadline. An application filed after the applicable filing date is untimely.

In this case, the initial application should have been filed in the trial court on or before June 18, 2015. The record indicates it was filed on June 23, 2015. Under Article 11.071, § 4A, Applicant’s failure to timely file should have been brought to this Court’s attention. Instead,
(continued...)

In May 2013, a jury convicted Applicant of capital murder for drowning his two young sons because he was angry at their mother, who had separated from him about eight months prior to the offense. *See* TEX. PENAL CODE § 19.03. The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant’s conviction and sentence on direct appeal. *Muhammad v. State*, No. AP-77,021 (Tex. Crim. App. Nov. 4, 2015) (not designated for publication).

In his application, Applicant presents nine challenges to the validity of his conviction and sentence. The trial court held an evidentiary hearing, entered findings of fact and conclusions of law, and recommended that we deny the relief Applicant seeks.

We have reviewed the record regarding Applicant’s allegations. Claims 6 through 9 are procedurally barred because they were raised and rejected on direct appeal, or they could have been raised on direct appeal, but were not. *See Ex parte Hood*, 304 S.W.3d 397, 402 n.21 (Tex. Crim. App. 2010) (“[T]his Court does not re-review claims in a habeas corpus application that have already been raised and rejected on direct appeal.”); *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) (“It is ‘well-settled that the writ of habeas corpus should not be used to litigate matters which should have been raised on direct

¹(...continued)

Applicant filed an “Unopposed Motion to Enter Findings of Fact and Conclusions of Law” in the trial court, asking it to rule that his application was timely filed. The trial court subsequently made such findings. Although the correct procedure was not followed, we now adopt the trial court’s findings on this issue and declare the writ application timely filed as of June 18, 2015.

appeal.’’).

In Claims 1 and 4, Applicant alleges that his trial counsel were constitutionally ineffective for failing to: sufficiently investigate and present mitigation evidence (Claim 1); and preserve the record for appeal (Claim 4). In Claim 5, Applicant alleges that trial counsel’s cumulative deficient performance prejudiced him. However, Applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel’s representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different but for counsel’s deficient performance. See *Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland*, 466 U.S. at 688).

In Claim 2, Applicant alleges that he is intellectually disabled under *Atkins v. Virginia*, 536 U.S. 304 (2002). However, the record shows that Applicant abandoned this claim during the subsequent habeas proceedings.

We adopt the trial court’s findings of fact and conclusions of law. Based upon the trial court’s findings and conclusions and our own review, we deny relief on Claims 1 and 3 through 9. We dismiss Claim 2.

IT IS SO ORDERED THIS THE 18TH DAY OF NOVEMBER, 2020.

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APPENDIX C

No. W11-00698-K(A)

In the Criminal District Court No. 4
Dallas County, Texas

**EX PARTE
NAIM RASOOL MUHAMMAD**

**STATE'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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I.

BACKGROUND FACTS

A. The Offense

In its opinion on direct appeal, the Court of Criminal Appeals summarized the facts and circumstances of the offense as follows:

[Applicant] drowned two of his sons, five-year-old Naim Muhammad and three-year-old Elijah Muhammad, because he was angry with their mother, Kametra Sampson, who had separated from [Applicant] about eight months before the offense. Because the circumstances of the instant offense are intertwined with [Applicant's] long history of abusing Kametra, we will begin with this history.

[Applicant] and Kametra met and began dating in 2003, when Kametra was fifteen years old and [Applicant] was twenty-five. Within a few weeks, [Applicant] began physically abusing Kametra. The first episode of abuse occurred during an argument in the back yard of [Applicant's] father's house. Kametra told [Applicant] that she was leaving and turned to walk away. [Applicant] grabbed her, threw her into his car, punched her repeatedly, and told her that she was not leaving. He did not let her go home that day.

[Applicant] beat Kametra once or twice a week for the first four or five years of their relationship, and then the beatings became more frequent. [Applicant] usually abused Kametra by punching her in the face with his fists. In 2006, Kametra told [Applicant] that she was pregnant. [Applicant] told her to get an abortion, and when she refused, he attempted to induce a miscarriage by punching and kicking her stomach. When that failed, [Applicant] urged Kametra to drink bleach or use a wire hanger, but Kametra did not do so. Kametra later gave birth to the couple's first child, Naim. In 2008, Kametra informed [Applicant] that she was pregnant with their second child. She again refused to get an abortion and [Applicant] again attempted to induce a miscarriage by punching and kicking her stomach. The attempt failed, and Kametra gave birth to Elijah. [Applicant] did not punch and kick Kametra in the stomach when she

informed him that she was pregnant with their third child, Jeremiah, but [Applicant] continued to physically abuse her by punching her in the face.

Around Christmas of 2010, Kametra left [Applicant], taking their three sons with her. [Applicant] continued to physically abuse Kametra when he had the opportunity. He also used their sons in his efforts to control her. For example, on February 24, 2011, [Applicant] showed up at Kametra's mother's house, and Kametra went outside to talk to him. He told Kametra that he wanted to take Naim and Elijah, but Kametra told him that he could not. She went back inside and tried to close the door, but [Applicant] forced his way into the house. He pushed Kametra against the wall and punched her in the face. He then rushed into the dining room and grabbed Naim. While carrying Naim, he kicked down a side door and fled. Police found Naim a short time later and returned him to Kametra.

As a result of this incident, [Applicant] was arrested for assaulting Kametra. [Applicant] was already on probation for a 2009 assault on his sister, and the State subsequently filed a motion to revoke his probation based on this new offense. However, the motion to revoke remained pending because [Applicant] stopped reporting to his probation officer and avoided contact with other law-enforcement officials.

Kametra and [Applicant] continued to communicate after the February 2011 incident, and the boys sometimes visited [Applicant]. [Applicant] repeatedly asked Kametra to reconcile with him, but she rejected his requests. On March 24, 2011, all three boys visited [Applicant] at his brother's house. [Applicant] told Kametra that he could not take Naim to preschool that day, so Kametra borrowed a car from her sister, Gabrielle, and drove to the house to pick up the boys. Kametra stopped the car in front of the house, loaded the children into the back seat, and sat down in the driver's seat. [Applicant], who was standing by the car, asked Kametra to take him to the store. She told him that she could not do that because she had to return the car to Gabrielle. [Applicant] climbed into the car anyway. Kametra again told [Applicant] that she could not take him to the store and asked him to get out of the car. [Applicant] became upset and choked Kametra into unconsciousness.

When Kametra regained consciousness, she and the boys were inside the house. [Applicant] hit Kametra in the head with a heavy object

when she told him that she needed to leave. Kametra finally persuaded [Applicant] to let her go, telling him that Gabrielle would call the police if she did not return the car soon. [Applicant] allowed Kametra to leave with the boys, but he insisted on riding with them.

Gabrielle was waiting outside when they stopped the car. As Kametra exited the car, Gabrielle saw her battered condition and called the police. [Applicant] picked up Elijah and told Kametra, who was holding Jeremiah, that he would kill Elijah if she did not walk away with him. [Applicant] walked away quickly, carrying Elijah. Kametra, still carrying Jeremiah, followed [Applicant] slowly because she did not want to go with him. [Applicant] attempted to hide when police officers arrived, but when he realized that the officers had seen him, he dropped Elijah and ran away.

By the time of the instant offense, a Child Protective Services ("CPS") worker had instructed Kametra not to let [Applicant] visit the boys unless his mother accompanied him. Kametra complied with this instruction. Nevertheless, at around 6:30 a.m. on Naim's first day of kindergarten, [Applicant] borrowed a friend's car and showed up at Kametra's house, unannounced and alone. He stated that he wanted to take Naim to school. Kametra and her mother told [Applicant] to leave several times before he complied.

A short time later, while Kametra and Elijah were walking Naim to school, [Applicant] pulled up in a car in front of them, jumped out, and picked up a rock. He threatened to hit Kametra in the head with it if she and the boys did not get into the car with him. After they were in the car, [Applicant] drove toward Naim's school, but he passed it without stopping and announced that Naim would not go to school that day. [Applicant] drove erratically while he threatened and hit Kametra. His demeanor alternated between hostile and affectionate. He told Kametra several times that he would kill her and the boys.

When [Applicant] stopped the car at a traffic light, Kametra saw a constable's car in the next lane. She jumped out of [Applicant]'s car and ran to the constable for help. Although the light was still red and another car was stopped in front of him, [Applicant] drove the car over the curb and sped away with the boys. He told them that their mother did not care

about them any more. He stopped the car near a creek and walked the boys down the embankment. The boys told [Applicant] that they loved him, and Naim asked him not to kill them.

Having second thoughts, [Applicant] walked the boys back up to the car and smoked a cigarette while he considered his next move. He concluded that he could not take the boys back to the house because the police would be waiting for them. After deciding to complete his plan, [Applicant] walked the boys back down the embankment. [Applicant] carried Elijah after Elijah complained that he could not walk down by himself. Elijah cried for his mother, and [Applicant] told the boys that she ran away and he did not know where she was. Naim repeated, "I love you, dad," over and over.

[Applicant] told the boys to sit down in the water, turn away from him, and pretend they were swimming. They complied, and he held their heads under water. Naim was kicking, but [Applicant] would not let him get up. [Applicant] did not let up until both boys stopped moving. [Applicant] left their bodies in the creek and drove to Kametra's house, where he broke a window in the room where Jeremiah was sleeping. [Applicant] attempted to climb through the window, but Kametra's brother entered the room and pushed [Applicant] back outside. [Applicant], as he was leaving, stated, "Your nephews are dead now."

After he committed the offense, [Applicant] evaded capture and resisted arrest. [Applicant] told his mother, who was waiting for him at his brother's house, that he would not go home because he knew the police were looking for him and he did not want to go back to jail. While law-enforcement officers searched for him, [Applicant] abandoned the car and fled on foot. He kicked and fought with the arresting officers when they found him. Five or six officers struggled to restrain him, and they "Tazed" him three times before they were finally able to handcuff him. [Applicant] did not stop fighting until he was handcuffed.

After the offense but before his capture, [Applicant]'s mother asked [Applicant] what he had done to her grandsons. [Applicant] told her that he "didn't do that" and that Kametra "did it" by refusing to let him see them. After he was captured, [Applicant] said in his statement to police that he regretted what he had done and that the only reason he killed the

boys was to prove a point to Kametra. He stated that he would not have done it if she had stayed with him in the car. Following his statement, [Applicant] asked the investigating officer to tell Kametra that it was her fault that he killed the boys because he would not have done it if she had let him see them. He also asked the investigator to tell his sisters that he was sorry he "did this stupid-ass shit."

While in jail, [Applicant] wrote a letter to Kametra's mother in which he stated that he would never do anything to hurt the boys. He declared that he still loved Kametra. He also stated that the boys' deaths were Kametra's fault because she got out of the car, and Kametra's mother's fault because she did not let [Applicant] into her house.

Muhammad v. State, No. AP-77,021, 2015 WL 6749922, at *1-3 (Tex. Crim. App. Nov. 4, 2015) (not designated for publication).

B. The State's Punishment Evidence

During punishment, the State presented evidence showing that Applicant's experience with the criminal justice system began at a young age and spanned a period of about twenty years. This evidence was presented through judicial records of prior criminal convictions, as well as live testimony regarding various extraneous adjudicated and unadjudicated offenses. The Court of Criminal Appeals summarized this evidence as follows:

[Applicant] had contact with the juvenile system before he was a teenager, and, when he was thirteen years old, he began committing criminal offenses that resulted in juvenile adjudications. Among other offenses, [Applicant] was adjudicated for evading arrest and for burglaries of habitations and vehicles. When he was fifteen years old, [Applicant] was sent to a juvenile home where he received individual and group counseling. After numerous rules infractions, however, including assaulting the same juvenile twice in one day, [Applicant] was discharged

from the home and sent to the Texas Youth Commission facility for Jefferson County ("TYC") in July 1995.

At TYC, [Applicant] was often explosive and disrespectful to staff. He was particularly hostile to female staff. On one occasion when he was being disciplined for disruptive behavior, [Applicant] looked toward a female officer and declared that he wanted to "beat somebody down," adding, "especially females." [Applicant] also committed rules infractions. For example, when he was found in possession of razor blades and crushed aspirin in December 1995, he admitted to staff that he stole the razor blades and crushed the aspirin to trade it for snacks. In September 1996, he was disciplined after he repeatedly punched a juvenile while another boy held the victim down. After [Applicant] was released from TYC, he resumed committing criminal offenses such as burglary and evading arrest.

[Applicant]'s history of violence toward women was not limited to Kametra. In 2001, [Applicant] threatened to beat a female neighbor after she saw him looking in her bathroom window and confronted him in her yard. He left when she called the police.

In 2009, [Applicant] hit his sister in the head with a hammer. When officers responded to the scene, his sister was crying, and fresh blood was running down the back of her head. [Applicant] had walked down the street to a convenience store after the incident. When he was brought back to the scene, he told officers that he had acted in self-defense. This incident was not the first time [Applicant] had hit his sister. As a result of this incident, [Applicant] pleaded guilty to a charge of aggravated assault with a deadly weapon and received five years' deferred adjudication. He did not comply with many of the conditions of his probation, including attending an anger-management course, performing community service, and obtaining a job. He also tested positive for drug use on several occasions. [Applicant] stopped reporting to his probation officer after his arrest for assaulting Kametra.

While in jail awaiting trial on the instant offense, [Applicant] committed violent disciplinary offenses. For example, he refused instructions to return a breakfast tray and "swung at" the officer who

entered his cell to retrieve it. On another occasion, [Applicant] fought with an inmate over the choice of a television show.

Muhammad, 2015 WL 6749922, at *5-6.

C. Applicant's Punishment Evidence

The defense presented evidence of the neglect, violence, and sexual abuse Applicant and his siblings suffered during childhood. Applicant had five siblings: Abdullah, Jamal, Aqueelah, Sekinah, and Rashad. (RR47: 140, 169-70, 183-84). Their mother, Naimah, was married to Roger Mopping when the children were young, until about the time that Jamal was in fifth grade. (RR47: 141, 170-71). Roger was the biological father of Jamal and Aqueelah. (RR47: 141, 183, 233, 248). Abdullah and Applicant were told that their biological father was a man named Lynn, but no one knew for sure. (RR47: 149-50, 154, 183-84, 233, 248-49). None of them knew who the biological father of Sekinah or Rashad was. (RR47: 149, 162-63, 184, 248-49). Naimah was a drug-addicted prostitute who was rarely home. (RR47: 148, 150, 184-86, 231, 235-36; RR48: 31, 38-39, 47). Roger also became addicted to drugs. (RR47: 149-50, 186, 234-35, 238). Roger loved Naimah but eventually left her because she kept getting pregnant by other men. (RR47: 249).

After Roger left, Naimah and the children moved in with Naimah's mother Dorothy May Butler ("Madea"), who was confined to a wheelchair. (RR47: 152-53, 187-88). Even though Madea was crippled and regularly needed assistance from the children,

this was the only stable portion of their childhood that they could recall. (RR47: 152-53, 187-88). After Madéa passed away, Naimah was married to Joe Johnson for a short time. (RR47: 142, 159). While Joe did work and put a roof over their head, he was an alcoholic and appeared to care more about his hogs than the children. (RR47: 159-61, 198-99, 245; RR48: 47). When Joe left Naimah, the children lived with a variety of different people. (RR47: 161, 164, 193, 206-08; RR48: 29, 45). The girls were taken in by family members and somewhat protected; however, the boys, who were all already involved in the juvenile system, were forced to fend for themselves. (RR47: 164, 177, 207; RR48: 29-30, 45-46, 52, 55). According to Jamal, they ate out of dumpsters and resorted to crime to make money. (RR47: 164-65).

Throughout their childhood, Applicant and his siblings were regularly exposed to drugs and violence in their home. Naimah, her sister Tina, and their brothers drank alcohol and smoked cracked cocaine together at the house, and these binges frequently ended with violent fights. (RR47: 167, 194-95; RR48: 39, 42-43). Naimah and Tina fought the most, and Tina was sent to prison for twenty years for stabbing Naimah in the face during one of their arguments. (RR47: 156-57, 195-97; RR48: 42). Naimah was also violent toward the children when she believed they were taking her drugs away. (RR47: 166, 189-92).

The children were also victims of sexual abuse. Abdullah, the eldest brother, sexually assaulted Aqueelah, Sekinah, and Applicant. (RR47: 202-03; RR48: 40-41).

Aqueelah and Sekinah recalled that he would frequently come into their room at night and rub his penis on them, fondle them, and ejaculate on them. (RR47: 202-03; RR48: 40-41). According to Applicant, Abdullah played with his penis and made Applicant play with his. (Defendant's Exhibit 11). Applicant also reported that he was sexually abused around age four or five by an older woman who asked him to have sex with her. (Defendant's Exhibit 11).

Both Aqueelah and Sekinah graduated from high school due to the guidance they received from the friends and relatives who helped take care of them in Naimah's absence. (RR48: 31-32, 37). However, no one encouraged the boys to attend school or stay out of trouble. (RR47: 204; RR48: 31-32, 46). To the contrary, the eldest brother, Abdullah, taught Jamal to steal and commit crimes, and that way of life was then passed on to Applicant and Rashad. (RR47: 153-55, 205; RR48: 32). Like Applicant, Abdullah, Jamal and Rashad were involved in a number of juvenile and adult crimes and spent time in prison. (RR47: 157-58, 163, 205-06; RR48: 29). Abdullah was shot in the chest when he was eighteen years old and survived; however, he died from complications related to that gunshot wound in January of 2011. (RR47: 158).

With regard to Applicant's medical history, the jury heard evidence that Applicant was struck by an automobile around age three and had to go to the hospital. (RR48: 177-78; Defendant's Exhibit 11). The jury also heard that, in 2009, Applicant

started having brain seizures and has been receiving treatment for epilepsy since that time. (RR48: 178-79; Defendant's Exhibit 11).

Dr. Gilbert Martinez, a clinical neuropsychologist, testified regarding Applicant's intellectual and cognitive functioning. (RR48: 100-02). In addition to reviewing Applicant's academic, juvenile, and medical records, Dr. Martinez conducted a five-hour clinical interview of Applicant and administered a battery of psychological tests. (RR48: 102-04, 106-07, 111-12, 141; DE 11). Dr. Martinez testified that Applicant has a full-scale IQ score of 76, which falls in the borderline range of intellectual functioning. (RR48: 114-16, 124-25, 133; DE 11). Based on his examination and the results of his testing, which showed deficits in executive functioning, Dr. Martinez diagnosed Applicant with Mild Neurocognitive Disorder. (RR48: 119, 122; DE 11). He opined that Applicant's deficits are not severe, but they are significant enough to interfere with some of his daily activities and, therefore, significant enough to warrant the diagnosis. (RR48: 122-23, 126-27). He explained that executive functioning controls a number of brain functions, including thinking, memory, attention, planning, reasoning, judgment, decision-making, and inhibition. (RR48: 110-11, 122-24; DE 11). An individual with executive functioning deficits like Applicant's would have poor judgment and reasoning and would have difficulty making decisions, controlling their emotions and behavior, understanding social situations, and learning from their mistakes. (RR48: 110-11, 119, 123-24, 126-27, 133-35, 164-65). Dr. Martinez opined that Applicant's deficits in

executive functioning are due to the combined effect of his epilepsy, the head injury he sustained as a child, and the lack of emotional support he received as a child. (RR48: 127-29, 133; DE 11). Dr. Martinez observed that the medication Applicant used to treat his epilepsy could also contribute to his cognitive deficits. (RR48: 128-29, 133; DE 11). He also acknowledged that Applicant's chronic illicit drug use could be a contributor to his deficits, or alternatively, his choice to use drugs could be the result of those deficits and his poor judgment. (RR48: 131, 133).

Dr. Kellie Gray-Smith, a licensed psychologist and specialist in school psychology, testified as an expert on special education, chronic school failure, and emotional disturbance in children. (RR49: 11-14). She explained that academic failure can develop for a number of reasons and it is not uncommon for an emotional disturbance to cause academic failure or vice versa. (RR49: 18-19, 59-60). She explained that many "externalizing behaviors" (e.g., aggression, fighting, profanity, disrespect, non-compliance) that often arise from underlying emotional or academic disabilities can be mislabeled as choice-based "bad behavior," with the result that a child who has such disabilities and exhibits such behavior does not receive appropriate support and intervention. (RR49: 19-21). Without such support, the child does not learn coping skills and is unable to regulate his emotions and respond to stressful situations "in a controlled way." (RR49: 21). She testified that literature shows that students whose needs are not recognized and addressed by an early age are at risk for chronic school

failure, which then often progresses into a variety of emotional, behavioral, and social problems such as school dropout, substance abuse, criminal activity, confinement in the penitentiary, unemployment, and mental illness. (RR49: 21-24, 31).

Dr. Gray-Smith reviewed Applicant's school records, the psychological evaluation done in 1994 when Applicant was a juvenile, and the report of Dr. Gilbert Martinez. (RR49: 26-27, 41). Dr. Gray-Smith testified that Applicant's school records demonstrate that Applicant experienced chronic school failure that started very early in elementary school and went unaddressed. (RR49: 29-30, 33). Dr. Gray-Smith noted that Applicant's school records from fourth and fifth grades included a mention of special education, but she believed that, based on his early poor performance, the school should have provided him with help in the first or second grade. (RR49: 30, 33). Despite this note, Applicant was never referred to special education. His school records showed that his behavioral and academic problems worsened after sixth grade and he received no intervention. (RR49: 30, 33).

Dr. Gray-Smith explained that if a child had behavioral problems but received no intervention before he was nine years old, his prognosis would be very poor with respect to preventing adolescent behavioral problems. (RR49: 31-32). Beyond the age of nine, a child's behavioral problems would be classified as a conduct disorder and generally result in suspension or expulsion. (RR49: 32, 35). Such disciplinary actions would disconnect the child from his school and important sources of help and support.

(RR49: 32-33). In addition, a child whose school records indicated that he had oppositional defiant disorder and whose juvenile records included a diagnosis of conduct disorder, but who received no intervention, would typically be diagnosed with antisocial personality disorder ("ASPD") as an adult. (RR49: 42-43). Dr. Gray-Smith testified it is common for people with this behavior pattern to end up in jail. (RR49: 43-44, 73). This is what is known within the psychological community as the "school-to-prison pipeline," and it is most prevalent with African-American males. (RR49: 44).

On cross-examination, Dr. Gray-Smith acknowledged that Applicant's school and psychological records suggest that he has ASPD. (RR49: 58, 66-67, 72). She also stated on redirect that a great majority of inmates in the penitentiary have the traits of ASPD, so an opinion that a person has ASPD is not a meaningful predictor of his future dangerousness in prison. (RR49: 73-74, 79).

D. The State's Rebuttal Evidence

In rebuttal, the State presented testimony from Warden Melodye Nelson, a 24-year veteran of the Texas Department of Criminal Justice ("TDCJ"). (RR49: 101-47). Warden Nelson testified as an expert on the prison system in Texas, explaining to the jury generally how inmates are classified and housed and how the opportunity for violence exists within the prison system. (RR49: 102-47). According to Warden Nelson, the Texas prison system is a well-run organization. (RR49: 121, 143). Nonetheless, she explained that there is an opportunity for violence throughout the prisons, regardless

of classification level. (RR49: 112, 118, 131, 144). Even on death row, the most secure unit in Texas, violence occurs. (RR49: 112-13). Whether an inmate will commit acts of violence depends on the individual inmate and his demeanor. (RR49: 133-34, 136, 142).

II.

PROCEDURAL HISTORY

In May 2013, a jury convicted Applicant of the August 22, 2011, capital murder of his two sons, Naim Muhammad Jr. and Elijah Muhammad. In accordance with the jury's answers to the special issues, this Court sentenced him to death on May 23, 2013.¹ Tex. Code Crim. Proc. Ann. art. 37.071, §§ 2(b),(e),(g). The Texas Court of Criminal Appeals affirmed Applicant's conviction and sentence on direct appeal on November 4, 2015. *See Muhammad*, 2015 WL 6749922.

Applicant timely filed his original application for writ of habeas corpus, and the State filed a general denial. Pursuant to a request from the parties, the Court agreed to conduct a live evidentiary hearing to resolve the claims raised in the application. On January 11, 2016, the Court entered an order designating the issues to be resolved at the hearing. The Court conducted a live evidentiary hearing on the designated issues on

¹ Visiting Judge Quay Parker presided over the trial. The current presiding judge of this Court, Judge Dominique Collins, was present in the courtroom and observed the entire trial.

February 28, March 1-2, March 5, and June 20-21, 2018. The Court heard final argument from the parties on December 14, 2018.²

The Court, having considered the allegations contained in the Application for Writ of Habeas Corpus, all pleadings and exhibits filed by the parties, the testimony and documentary evidence offered at the live evidentiary hearings, argument presented by the parties, official court documents and records, and the Court's personal experience and knowledge of the case, makes the following findings of fact and conclusions of law:

III.

GENERAL FINDINGS OF FACT

- (1) The Court takes judicial notice of the Court's trial file in cause number F11-00698-K.
- (2) The Court takes judicial notice of the 2 volumes of the clerk's record from the trial in cause number F11-00698-K. Citations to these records will be "CR1" and "CR2."
- (3) The Court takes judicial notice of all 52 volumes of the reporter's record from the trial in cause number F11-00698-K. Citations to this record will be "RR-."

² Judge Parker presided over the writ proceedings from March 2017 until his death in October 2018. Judge Collins presided over the final arguments in December 2018. Because Judge Parker is no longer available, it is permissible for Judge Collins to enter findings of fact and conclusions of law based on her personal knowledge of the case from observing the entire trial and her review of the record. *See, e.g., Velez v. State*, AP-76,051, 2012 WL 2130890, at *14 (Tex. Crim. App. June 13, 2012) (not designated for publication) (findings of fact and conclusions of law on a motion to suppress, which were prepared by a successor judge based on the record and transcript of the suppression hearing, were sufficient where the judge who presided over the suppression hearing was unavailable); *Pavon-Maldonado v. State*, No. 14-13-00944-CR, 2015 WL 1456523, *4 n.5 (Tex. App.—Houston [14th Dist.] Mar. 26, 2015, no pet.) (mem. op., not designated for publication) (accepting findings of fact and conclusions of law signed by successor judge when hearing judge had resigned and agreed to be disqualified).

- (4) The Court takes judicial notice of the Court's writ file in cause number W11-00698-K(A).
- (5) The Court takes judicial notice of all 22 volumes of the reporter's record from the writ proceedings in cause number W11-00698-K(A). Citations to this record will be "WRR-."

IV.

SPECIFIC FINDINGS OF FACT

GROUND 1, 4 AND 5: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

- (6) In his first, fourth, and fifth grounds for relief, Applicant contends that he was denied the effective assistance of trial counsel. *See* Writ Application at 17-55, 90-98.
- (7) The Court finds that Applicant has failed to prove his claims by a preponderance of the evidence.

Applicable Law

- (8) An applicant asserting a claim of ineffective assistance of counsel has the burden to prove, by a preponderance of the evidence, that (1) counsel's performance was deficient, falling below an "objective standard of reasonableness," and (2) the deficient performance prejudiced the defense such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012).
- (9) An accused is not entitled to representation that is wholly errorless. *Frangias v. State*, 392 S.W.3d 642, 653 (Tex. Crim. App. 2013). Reviewing courts indulge a strong presumption that counsel's conduct fell within the wide range of reasonable assistance, and that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. The mere fact that another attorney might have pursued a different tactic at trial does not suffice to prove a claim of ineffective assistance of counsel. *Ex parte Miller*, 330 S.W.3d 610, 616 (Tex. Crim. App. 2009). The *Strickland* test is judged by the totality of the representation, not by counsel's isolated acts or omissions, and the test is applied from the viewpoint

of an attorney at the time he acted, not through 20/20 hindsight. *Jiminez*, 364 S.W.3d at 883.

- (10) Although a reviewing court may refer to standards published by the American Bar Association and other similar sources as guides to determine prevailing professional norms, publications of that sort are only guides because no set of detailed rules can completely dictate how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688-89.
- (11) Ineffectiveness claims may not be built on retrospective speculation; the record must affirmatively demonstrate the alleged ineffectiveness. *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). Moreover, in a habeas proceeding, the applicant bears the burden of proving his factual allegations by a preponderance of the evidence. *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex. Crim. App. 1997).
- (12) When the record is silent on the motivations underlying counsel's tactical decisions, an applicant alleging ineffective assistance usually cannot overcome the strong presumption that counsel's conduct was reasonable. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). Reviewing courts must defer to strategic and tactical decisions of trial counsel as long as those decisions are informed by adequate investigation of the facts of the case and the governing law. *Frangias*, 392 S.W.3d at 653 (citing *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990)). In the absence of direct evidence of counsel's reasons for the challenged conduct, an appellate court will assume a strategic motivation, if one can be imagined. *Garcia v. State*, 57 S.W.3d 432, 441 (Tex. Crim. App. 2001).
- (13) Moreover, if a reviewing court can speculate about the existence of further mitigating evidence, then it just as logically might speculate about the existence of further aggravating evidence. *Bone*, 77 S.W.3d at 835-36.
- (14) The Court finds Applicant fails to rebut the presumption that his trial counsel acted consistent with reasonable trial strategy.
- (15) The Court finds that Applicant fails to prove that any alleged deficiency prejudiced his defense.

The Defense Team

- (16) The Court finds that Applicant is contesting the strategic choices of three qualified and experienced counsel: Paul Johnson, Mark Watson, and Kobby Warren.
- (17) The Court finds and judicially notices that, at the time of Applicant's trial, all of his trial counsel were qualified and approved for appointment to death penalty cases in the First Administrative Judicial District as required by article 26.052 of the Texas Code of Criminal Procedure.
- (18) The Court finds that, in addition to meeting the above standards, all three of Applicant's trial counsel were and are experienced and highly qualified criminal trial attorneys.
- (19) Lead counsel Paul Johnson has been licensed to practice law in Texas since 1984. Mr. Johnson worked as an assistant district attorney until 1988 and then started his private criminal law practice. He has been practicing as a criminal defense attorney for thirty years. He has extensive experience in trying murder cases, and he regularly handles criminal cases with complex mental health issues. He also regularly attends continuing legal education seminars pertaining to criminal defense in capital cases. Mr. Johnson has been successful in obtaining life sentences for two of his clients facing the death penalty. (WRR3: 146-47, 149, 156; WRR7: 181, 183-84).
- (20) Co-counsel Mark Watson has been licensed since 1984. Mr. Watson worked for the public defender's office for about one year and then started his private criminal law practice. At the time of trial, he had been approved for appointment in death penalty cases for about one year. (WRR4: 22-23, 58).
- (21) Co-counsel Kobby Warren has been licensed since 2000. He worked as an assistant district attorney for over three years and then transitioned into his private criminal law practice. He has handled juvenile, federal, and state criminal cases in Dallas and Tarrant counties, and he is admitted to practice in the Northern and Eastern Districts of Texas. Mr. Warren has tried two death penalty cases as defense counsel and one death penalty case as a special prosecutor. (WRR4: 27, 82-84, 108-10).

- (22) Mr. Johnson and Mr. Watson were appointed to represent Applicant just after he was arrested in August 2011. (WRR3: 140; WRR4: 22; WRR7: 186-87). Mr. Warren joined the defense team in January 2013, before individual voir dire began. (WRR4: 27, 112-13). Over the course of their representation of Applicant, all three attorneys devoted a significant amount of time and effort to investigating Applicant's life and developing a defense.
- (23) There was no formal division of duties among the members of the defense team. Mr. Johnson, as lead counsel, led the development of the case, but overall they worked as a team on all aspects of Applicant's case. (WRR4: 23-24, 62-63, 79-80, 151; WRR7: 171).
- (24) During the guilt-innocence phase of trial, counsel did not contest the facts of the offense or of Applicant's guilt. Rather, counsel's strategy was to acknowledge the horrendous facts of the crime in order to gain credibility with the jury. This strategy began during voir dire with the goal of selecting jurors who were willing to listen and consider Applicant's punishment evidence despite the horrific nature of the crime. (WRR4: 50-51, 122).
- (25) During the punishment phase, counsel presented evidence related to four main mitigation themes:
- Cognitive Deficits – evidence that Applicant has intellectual and cognitive deficits, caused by a variety of factors, that impaired his executive functioning;
 - Environment – evidence that environmental factors (i.e., horrific childhood and lack of support) negatively influenced his life and contributed to his cognitive deficits;
 - Failure of Society – evidence showing that the failure of society and community to assist Applicant during adolescence led him to where he is today; and
 - Future Danger – evidence that Applicant is not a future danger because he can be controlled in TDCJ. (WRR4: 114-16, 153; AWE 63).
- (26) The Court finds that, based on their extensive experience, Mr. Johnson, Mr. Watson, and Mr. Warren were qualified to formulate and execute an effective trial strategy.

- (27) Although the Court did not hear their live testimony at the writ hearing, the Court is familiar with Mr. Johnson, Mr. Watson and Mr. Warren. They are members of the bar in good standing and officers of the court. They enjoy good reputations for honesty and integrity amongst the bench and bar, and the Court has no reason to doubt the truthfulness of their testimony.

GROUND 1: INVESTIGATION AND PRESENTATION OF MITIGATION EVIDENCE

- (28) In his first ground for relief, Applicant contends that trial counsel were ineffective for failing to sufficiently investigate and present mitigating evidence. *See* Writ Application at 17-55.
- (29) The Court finds that Applicant has failed to prove this claim by a preponderance of the evidence.

Mitigation Investigation and Selection of Experts

- (30) Applicant contends that counsel unreasonably limited the scope of their mitigation investigation by selecting experts prior to the completion of lay-witness interviews. *See* Writ Application at 21.
- (31) The Court finds that Applicant has failed to prove this claim by a preponderance of the evidence.
- (32) The record reflects that the defense team investigated Applicant's medical history, family and social history, educational history, employment and training history, juvenile and adult correctional experience, and potential mental health issues. (WRR4: 67, 195-96; WRR7: 192-93). The team collected this information through record collection and face-to-face interviews with Applicant's family members and other relevant witnesses. (WRR4: 151, 174).
- (33) Counsel retained investigators Jeff Gardner and Rex Reynolds to assist them in gathering records and locating witnesses. (WRR4: 30-32; WRR7: 180, 189). Gardner and Reynolds have worked as private investigators in Dallas County for many years and are particularly knowledgeable and experienced with regard to obtaining records. (WRR4: 64-65).
- (34) Counsel also retained numerous experts to assist them in the investigation, development, and presentation of their mitigation case.

- (35) Counsel retained Dr. Kristi Compton, a clinical and forensic psychologist, as their mitigation specialist. (WRR3: 249; WRR4: 61, 80, 121, 135, 137, 146; WRR7: 187). Dr. Compton is highly qualified and respected in the forensic community, and she has been recognized by Texas courts as an expert on many occasions. (WRR4: 191-92; WRR7: 187). Dr. Compton has extensive training and experience in administering IQ and neuropsychological testing. (WRR4: 218). Dr. Compton assisted the defense team in conducting witness interviews, procuring experts, and developing trial strategy. (WRR4: 147-149). Dr. Compton's assistant, a licensed investigator, also assisted with the investigation, witness interviews, and evidence collection in this case. (WRR4: 138; WRR7: 189).
- (36) Counsel retained Dr. Gilbert Martinez, a clinical neuropsychologist, to evaluate Applicant's intellectual and cognitive functioning. Dr. Martinez examined Applicant's academic, juvenile, and medical records, conducted a 5-hour interview with Applicant, and administered a battery of psychological and neuropsychological tests on Applicant. Dr. Martinez provided trial testimony on the "cognitive deficits" element of their mitigation case. (RR48: 100-135; WRR3: 192-97; WRR4: 153; WRR7: 209-10; AWE 23).
- (37) Counsel retained Dr. Kellie Gray-Smith, a licensed psychologist and specialist in school psychology, to testify as an expert on special education, chronic school failure, emotional disturbance in children, and the school-to-prison pipeline. Dr. Gray-Smith provided expert testimony on the "failure of society" element of their mitigation case. (WRR3: 160; WRR4: 153; WRR7: 199-200).
- (38) Counsel retained Dr. Mark Vigen, a clinical psychologist, as a consulting expert and potential testifying expert. In addition to his qualifications as a psychologist, Dr. Vigen has specialized knowledge and expertise on the prison system and future dangerousness, and he has published several articles on the prediction of violence in prison settings. Dr. Vigen was prepared to testify during the punishment phase of Applicant's trial; he was not called, however, because the defense team felt that the State's prison expert gave an accurate and fair portrayal of the Texas prison system and its ability to control inmates. (WRR3: 178, 185-86; WRR4: 165; WRR7: 216; WRR8: 7-8).
- (39) Counsel retained Dr. Edward Gripon, a psychiatrist, as a consulting expert and potential testifying expert. Dr. Gripon did a sanity evaluation, as well as a general

psychiatric evaluation assessing mental illness, cognitive functioning, future dangerousness, and factors in Applicant's background that might be relevant to his mental state and the commission of the offense. Dr. Gripon's findings contained both favorable and unfavorable information. Dr. Gripon was present and prepared to testify during the punishment phase of Applicant's trial, but the defense team made a strategic decision not to call him. (WRR3: 189-192; AWE 39, 71).

- (40) The testimony from the writ hearing reflected that the defense team's investigation was constantly ongoing; the team built upon the information gathered and tweaked their trial strategy as the case progressed according to the information they uncovered. Both Mr. Johnson and Dr. Compton testified that if the defense team's investigation had revealed the need to hire different or additional experts than the ones they had already retained, they would have done so. (WRR4: 210-11; WRR8: 15-16).
- (41) The record does not support Applicant's assertion that counsel unreasonably limited the scope of their mitigation investigation. To the contrary, the record reflects that counsel's investigation was extensive and thorough. Applicant has not shown that his trial team was unaware of any significant facet of his social history.
- (42) Applicant has asserted that there are some witnesses that counsel failed to interview and/or present to the jury that could have provided mitigating evidence. However, the witnesses also likely possessed aggravating evidence. *See Bone*, 77 S.W.3d at 835-36 (if a reviewing court can speculate about the existence of further mitigating evidence, then it just as logically might speculate about the existence of further aggravating evidence).
- (43) The Court finds that counsel were not deficient and Applicant was not prejudiced by counsel's mitigation investigation and selection of experts.

Failure to retain an epilepsy expert

- (44) Applicant contends that counsel were ineffective for failing to retain an epilepsy expert. According to Applicant, trial counsel should have consulted with and presented testimony from Dr. Mark Agostini, or a similarly qualified epileptologist, to explain the possible causes of Applicant's seizure disorder and its effects on his behavior. He claims that Dr. Agostini or a similar expert could

have explained that Applicant's seizures were mitigating and that the medication he was prescribed to treat his seizures may have contributed to his impulsive, aggressive behavior in the years leading up to offense. *See* Writ Application at 20, 23-24, 27-37.

- (45) The Court finds that Applicant has failed to prove this claim by a preponderance of the evidence.
- (46) The defense team was aware of Applicant's history of seizures beginning in 2009 and his subsequent diagnosis of epilepsy. The defense team obtained Applicant's medical records documenting the seizures and the medical treatment Applicant had received. (WRR3: 227; WRR4: 70-72, 206-07; WRR7: 205-06).
- (47) The medical records reflect that Applicant had multiple CT scans, all of which were unremarkable. (WRR4: 207-08; WRR7: 206). The MRI obtained by the defense team was also unremarkable. (WRR3: 222, 225; AWE 15, 16).
- (48) While evidence of epilepsy could be viewed as mitigating, there were other considerations that made this evidence also potentially damaging. The medical records reflected that Applicant was repeatedly non-compliant with his seizure medications. (WRR4: 208-09; WRR7: 207). Applicant and his family members reported to counsel that, during the time period that Applicant was experiencing seizures, he was also using PCP regularly, which can exacerbate a seizure disorder. (RR3: 228-29; WRR4: 210; WRR8: 28-29). Additionally, the defense team recognized that there is a concern about post-ictal aggression with epilepsy patients, and they were concerned this evidence could weigh against Applicant in the jury's consideration of future dangerousness. (WRR4: 208; WRR8: 22-23, 33-34).
- (49) The defense team carefully weighed the potentially mitigating strength of this evidence against the potentially aggravating aspects. The team also discussed how to use this evidence in a way that was cohesive with their other punishment evidence. (WRR4: 70-72, 208-09; WRR8: 22-23).
- (50) Ultimately, the defense team made the strategic decision to present the fact of Applicant's seizure disorder through his family and the potential cognitive effects through their neuropsychologist, Dr. Gilbert Martinez. (WRR3: 232; WRR4: 70-72, 208-09; WRR7: 208). Dr. Martinez testified at trial that Applicant's seizure

disorder was one of several potential causes for his cognitive deficits and impaired executive functioning. (RR48: 127-29, 133, DE 11; WRR3: 232).

- (51) The Court finds that counsel's strategy with regard to the presentation of Applicant's seizure disorder was not deficient.
- (52) Additionally, Applicant has not proven by a preponderance of the evidence that, had trial counsel called Dr. Agostini or a similar expert to testify at trial, the outcome would have been different.
- (53) Nothing in Dr. Agostini's testimony undermined trial counsel's strategic reasons for refraining from emphasizing Applicant's seizure disorder at trial. In fact, Dr. Agostini's testimony at the writ hearing demonstrated that trial counsel's concerns were warranted.
- (54) Dr. Agostini testified that most patients diagnosed with epilepsy want to figure out how to prevent seizures and it takes trial and error, as well as diligence, to figure out which drug or combination of drugs is most effective for the patient. (WRR6: 138-40). He stated that it is very important for the patient to adhere to the medicine regime they are prescribed and to attend follow-up appointments to discuss whether the treatment is working. (WRR6: 140-41). Applicant did neither. He was regularly non-compliant with his medication and never got an EEG or attended follow-up appointments as directed. (WRR6: 148-54, 156-57).
- (55) Dr. Agostini testified that use of illicit drugs can exacerbate a seizure disorder and is strongly discouraged. (WRR6: 142). Yet, multiple family members reported, and Applicant even admitted to counsel, that he was using PCP during the same time period that he was experiencing seizures. (WRR8: 28-29).
- (56) While Dr. Agostini testified regarding the potential side effects of Keppra, a drug that had been prescribed to Applicant, he also acknowledged that it is unknown if or how frequently Applicant actually took Keppra. He also acknowledged that homicide is not one of the recognized side effects. (WRR6: 165-67).
- (57) These statements and concessions by Dr. Agostini make the circumstances of Applicant's seizure disorder far less mitigating than writ counsel portrays.
- (58) Additionally, Dr. Bhushan Agharkar testified at the writ hearing that people with seizure disorders not only have cognitive problems, but also behavioral and

mood problems as well. He stated that these insults "can affect people for the rest [of] their lives...the brain can try to remold..., but damage is damage and that's not curable." (WRR8: 143). Such testimony could certainly be aggravating in front a jury that is tasked with determining whether someone is a future danger. Indeed, this was the type of aggravating evidence that counsel strategically tried to avoid. (WRR8: 22-23).

- (59) The Court finds that counsel were not deficient, and Applicant was not prejudiced by counsel's decision not to retain or present testimony from an epilepsy expert.

Failure to retain a neurologist

- (60) Applicant contends that counsel were ineffective for failing to consult with and present testimony from a neurologist. *See* Writ Application at 20, 24-25, 38.
- (61) The Court finds that Applicant has failed to prove this claim by a preponderance of the evidence.
- (62) Applicant claims that counsel should have called neurologist Dr. Pamela Blake, or a similar expert, to explain the breadth of Applicant's neurological and cognitive impairment and how this impairment hampered his ability to make rational decisions, exercise judgement, and control his impulses. *See* Writ Application at 20, 24-25, 37-51.
- (63) Although trial counsel did not consult with or call a neurologist, they did consult with and call and neuropsychologist.
- (64) At trial, counsel presented expert testimony from Dr. Gilbert Martinez, a clinical neuropsychologist, regarding the breadth and effects of Applicant's cognitive and intellectual impairment. Dr. Martinez reviewed numerous records, conducted a 5-hour clinical interview, and administered a battery of neuropsychological tests to Applicant. The neuropsychological testing revealed that Applicant has deficits in executive functioning, which led Dr. Martinez to diagnose Applicant with Mild Neurocognitive Disorder. Dr. Martinez explained that, as a result of his deficits, Applicant has poor judgment and reasoning and has difficulty making decisions, controlling his impulses, and learning from his mistakes. (RR48: 110-35, 164-65). Dr. Martinez opined that applicant's deficits in executive functioning are due to the combined effect of his epilepsy, the head

injury he sustained as a child, and the lack of emotional support he received as a child. He also observed that the medication applicant used to treat his epilepsy could contribute to his cognitive deficits. (RR48: 127-33; DE 11).

- (65) At the writ hearing, Dr. Blake testified that Applicant suffers from cognitive and intellectual impairment. She opined that this impairment was caused by the combined effect of genetic factors, the injuries Applicant sustained as a child, his impoverished childhood, and his epilepsy. Dr. Blake explained that someone with deficits like Applicant would display a lack of inhibition, an inability to control impulses, and an inability to learn from feedback and conform one's behavior. (WRR7: 118-19).
- (66) In comparing the testimony, it is clear that trial counsel's retained neuropsychologist provided essentially the same testimony that Applicant now contends should have been presented through Dr. Blake or a similar neurologist. The fact that writ counsel would have used a different expert to present this evidence does not demonstrate that counsel was deficient. *See Miller*, 330 S.W.3d at 616 (the mere fact that another attorney might have pursued a different tactic at trial does not suffice to prove a claim of ineffective assistance of counsel).
- (67) Moreover, a neurologist like Dr. Blake cannot perform neuropsychological testing. (WRR7: 114). Within the scientific community, neuropsychological testing is a useful tool for measuring an individual's impairment and determining the effect, if any, it has on the individual's daily functioning. (WRR5: 205; WRR6: 162-64). By retaining a neuropsychologist, trial counsel was able to do both with one expert – obtain testing as well as present expert testimony to the jury about the breadth and effects of Applicant's cognitive impairment.
- (68) The Court finds that counsel were not deficient for consulting with and presenting testimony from a neuropsychologist rather than a neurologist.
- (69) Applicant acknowledges the testimony of Dr. Martinez, but attacks the thoroughness of his testing and counsel's presentation of his findings to the jury through experts Dr. Joan Mayfield and Dr. Bhushan Agharkar.
- (70) Dr. Mayfield and Dr. Agharkar did not perform their own testing and did not take issue with Dr. Martinez's administration or scoring of the tests. They even agreed with his ultimate conclusions. (WRR8: 86-88; 103, 157). They simply

believe that Dr. Martinez should have reviewed *more* information and counsel could have presented *more* testimony on this topic.

- (71) Neither of these witnesses knew if or why counsel may have limited the referral questions and information given to Dr. Martinez. (WRR8: 10, 85-86, 124). While both Dr. Mayfield and Dr. Agharkar are qualified mental health professionals, they are not attorneys and not experts on the legal strategy involved in defending a capital murder defendant.
- (72) Indeed, Mr. Johnson had a valid, strategic reason for limiting Dr. Martinez's presentation before the jury. He explained: "Whenever you talk about individuals that have a lack of ability to control their behavior, lack of ability to control their impulsivity, I mean you are basically making an emphasized fact that these people are somewhat of a live wire that can go off at any moment." (WRR8: 22). As such, the defense team discussed and developed a strategy of how to present Dr. Martinez's testimony in such a way that did not put fear in the minds of the jury that Applicant would be a future danger.
- (73) In addition, the Court finds that Applicant has not shown the outcome of the proceeding would be different had counsel presented testimony from Dr. Blake or a similar expert.
- (74) Dr. Blake did not uncover anything significant about Applicant's cognitive and neurological functioning of which trial counsel were unaware. Dr. Blake also did not testify about any significant aspect of Applicant's cognitive and neurological functioning that was not presented to the jury.
- (75) Applicant has not shown that the testimony of Dr. Blake or a similar expert would have been significantly different or more persuasive than that of Dr. Martinez.
- (76) The Court finds that counsel were not deficient and Applicant was not prejudiced by counsel's decision not to retain or present testimony from a neurologist.

Failure to retain a childhood developmental psychologist

- (77) Applicant contends that counsel were ineffective for failing to consult with and present testimony from a childhood developmental psychologist. Applicant

claims that counsel should have called Dr. George Holden, or a similar expert, to testify about Applicant's horrific childhood and make a connection between that trauma and Applicant's delinquent and criminal behavior later in life. *See* Writ Application at 20, 26, 38-51.

- (78) The Court finds that Applicant has failed to prove this claim by a preponderance of the evidence.
- (79) The ABA guidelines do not require that a defendant's social history be presented through expert testimony. They provide that "[e]xpert witnesses may be useful for this purpose and may assist the jury in understanding the significance of the observations." *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.11, Commentary (2003). The guidelines also state that counsel should use lay witnesses as much as possible to provide the factual foundation for the expert's conclusions. *Id.*
- (80) During the course of their mitigation investigation, the defense team realized they could get most, if not all, of the facts of Applicant's horrific childhood through lay testimony from Applicant's family members. (WRR4: 50, 69, 115):
- (81) The team made the strategic decision to present Applicant's social history through family members rather than through an expert. At the writ hearing, the defense team explained the basis of this strategic decision as follows:
 - The defense team believed, based on their experience from past trials and in canvassing jurors, that this information would be the most authentic, effective, and impactful coming from the family. (WRR4: 50, 69-70, 115, 118-19, 211-13; WRR7: 196-97). An expert witness relaying information about a defendant's life does not convey the same raw emotion as a family member who lived it and felt it. (WRR4: 212-13; WRR7: 196-99).
 - The defense team knew from experience that jurors often perceive experts as "paid" and not trustworthy. (WRR4: 211-12; WRR7: 196-99).
 - Using lay witnesses eliminates the possibility of harmful information coming out on cross-examination from defense experts. (WRR4: 69).
- (82) After presenting the facts of Applicant's social history through lay witnesses, trial counsel then presented testimony from Dr. Gray⁴Smith, a licensed psychologist

and specialist in school psychology, to explain the connection between some of Applicant's childhood experiences and his delinquent and criminal behavior later in life. (RR49: 11-79).

- (83) The Court finds that counsel's strategy with regard to the presentation of Applicant's social history was not deficient.
- (84) Additionally, Applicant has not proven by a preponderance of the evidence that, had trial counsel called Dr. Holden or a similar expert, the outcome would have been different here.
- (85) Dr. Holden did not uncover any significant aspect of Applicant's social history of which trial counsel were unaware. He also did not testify about any significant aspect of Applicant's social history that was not presented to the jury.
- (86) Nothing in Dr. Holden's testimony undermined trial counsel's strategic reasons for refraining from presenting Applicant's social history through an expert.
- (87) The Court finds that counsel were not deficient and Applicant was not prejudiced by counsel's decision to present the facts of Applicant's horrific childhood through family members rather than an expert.
- (88) The Court finds that counsel were not deficient and Applicant was not prejudiced by counsel's strategic decision to explain the connection between Applicant's childhood experiences and his delinquent and criminal behavior later in life through the testimony of Dr. Gray-Smith rather than an expert like Dr. Holden.
- (89) In sum, trial counsel were not ineffective for failing to call additional witnesses. They were not ineffective for failing to elicit additional testimony from the witnesses that they did call. And they were not ineffective for choosing to present the witnesses that they presented. All such choices were within the realm of reasonable representation.
- (90) The record does not support a finding that any uncalled witness had significant mitigating evidence to offer.

- (91) Further, the Court finds that Applicant's conviction and death sentence were all but inevitable given the horrific nature of his crime. The result would have been the same had trial counsel made different strategic choices.
- (92) The Court concludes that Applicant's claims asserted in ground one are without merit and recommends that the relief requested be denied.

GROUND 4: PRESERVATION OF RECORD

- (93) In his fourth ground for relief, Applicant contends that trial counsel were ineffective for failing to preserve the record for appeal. *See* Writ Application at 90-96.
- (94) The Court finds that Applicant has failed to prove this claim by a preponderance of the evidence.
- (95) At the writ hearing, counsel specifically denied that any matters of substance were excluded from the trial record. (WRR4: 72, 120; WRR8: 20-21).
- (96) Mr. Johnson, a very experienced trial attorney, testified that he knows when issues need to be included on the record. He explained that many of the conversations held off the record dealt with scheduling or other non-substantive issues. He testified that if he felt any of those discussions needed to be included in the record, he would have specifically asked to include them. (WRR4: 55, 99-100; WRR8: 20-21).
- (97) Mr. Watson and Mr. Warren similarly testified that they made every effort to ensure that all matters of substance were included on the record. (WRR4: 72, 120).
- (98) Moreover, the Court knows from personal experience that courts frequently takes breaks in trial to handle other, unrelated court matters and to allow court personnel, the attorneys, and the jurors a brief break in the proceedings. The record would not reflect if or when these types of breaks were taken, only that the Court went "off the record."
- (99) The Court finds, based on counsel's testimony as well as its own personal knowledge of the trial proceedings, that no matters of substance were excluded from the record.

- (100) The Court finds that counsel were not deficient in regards to making a complete trial record in this case.
- (101) Further, the Court finds that Applicant has not proven prejudice. He fails to demonstrate that the discussions conducted off the record, if included on the record, would have changed the outcome of the trial or appeal.
- (102) The Court finds that counsel were not deficient and Applicant was not prejudiced in regards to counsel's preservation of the record in this case.
- (103) The Court concludes that this claim is without merit and recommends that the relief requested in ground four be denied.

GROUND 5: CUMULATIVE HARM

- (104) In his fifth ground for relief, Applicant contends that trial counsel's "cumulative deficient performance" over the course of the trial prejudiced him. Applicant does not allege any additional instances of deficient performance; rather, he argues that counsel's errors alleged in grounds one (failure to sufficiently investigate and present mitigating evidence) and four (failure to preserve the trial record), when viewed collectively, create a cumulative effect that deprived him of a constitutionally sound trial. *See* Writ Application at 96-98.
- (105) This Court has resolved grounds one and four against Applicant.
- (106) Applicant has failed to prove by a preponderance of the evidence that trial counsel were ineffective in any other regard.
- (107) Having found no constitutional violations occurred in grounds one or four, the Court finds that no "cumulative" harm could have occurred. *See Hughes v. State*, 24 S.W.3d 833, 844 (Tex. Crim. App. 2000).
- (108) The Court concludes that this claim is without merit and recommends that the relief requested in ground five be denied.

GROUND 2: INTELLECTUAL DISABILITY

- (109) In his second ground for relief, Applicant contends that he is intellectually disabled and therefore ineligible for a death sentence under *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014). See Writ Application at 55-78.
- (110) In 2002, the United States Supreme Court held in *Atkins* that the execution of intellectually disabled³ individuals violates the Eighth Amendment. *Atkins*, 536 U.S. at 321. While the Court found that there was a national consensus opposing the execution of the intellectually disabled, the Court acknowledged that there existed disagreement in determining which offenders are in fact intellectually disabled. *Id.* at 317. In addition, it observed that not all people who claim to be intellectually disabled will be so impaired as to fall within the range of intellectually disabled offenders about whom there is a national consensus. *Id.* The Court left to the individual states the task of developing appropriate ways to enforce the constitutional restriction. *Id.* at 317.
- (111) Subsequently, in *Hall v. Florida*, the Supreme Court held that a state cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score close to, but above, 70. See *Hall*, 572 U.S. at 721-23. The Supreme Court further clarified that although the legal determination of intellectual disability is distinct from a medical diagnosis, it must be “informed by the medical community’s diagnostic framework.” *Hall*, 572 U.S. at 721.
- (112) Mental health professionals use the Diagnostic and Statistical Manual of Mental Disorders, commonly referred to as the “DSM,” to evaluate individuals and determine whether they meet the diagnostic criteria for intellectual disability. This manual is currently in its fifth edition. See American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5th ed. (2013) (“DSM-5”).⁴

³ At the time of the *Atkins* decision, the term “mental retardation” was used; however, that term has been replaced with the term “intellectual disability.” *Ex parte Cathey*, 451 S.W.3d 1, 11 n.23 (Tex. Crim. App. 2014) (noting change from “mental retardation” to “intellectual disability”).

⁴ At the time of Applicant’s trial, practitioners were using the fourth edition of the DSM. (WRR4: 221-22); American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, Text Revision 4th ed. (2000) (“DSM-4”).

- (113) Texas courts currently follow the framework set forth in the DSM-5 for assessing claims of intellectual disability. *See Thomas v. State*, No. AP-77,047, 2018 WL 6332526, at *4 (Tex. Crim. App. Dec. 5, 2018) (not designated for publication). Under the DSM-5, an individual is intellectually disabled if the following three criteria are met: (A) deficits in intellectual functions, (B) deficits in adaptive functioning, and (C) onset of intellectual and adaptive deficits during the developmental period. *See* DSM-5 at 33.⁵
- (114) Criterion A, intellectual functioning, is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence (i.e., IQ tests). Individuals with intellectual disability have a score of about 70 or below, approximately two standard deviations or more below the population mean, including a margin for measurement error. *See* DSM-5 at 37.
- (115) Criterion C recognizes that the intellectual deficits must have been present during childhood or adolescence. *See* DSM-5 at 37.
- (116) The State does not have the burden of disproving Applicant's claim of intellectual disability. As with any other claim for habeas relief, Applicant bears the burden of proving he is intellectually disabled by a preponderance of the evidence. *See Cathey*, 451 S.W.3d at 10; *Gallo v. State*, 239 S.W.3d 757, 778 (Tex. Crim. App. 2007).
- (117) Applicant's writ counsel obtained funding from this Court and retained several mental health experts to assist them in their preparation and presentation of evidence during Applicant's writ proceedings. The claim of intellectual disability was fully investigated and developed by writ counsel.
- (118) The experts retained by Applicant's writ counsel advised them that Applicant does not meet all three prongs required for a diagnosis of intellectual disability.

⁵ At the time of Applicant's trial, Texas courts applied the following definition of intellectual disability: (1) significantly subaverage general intellectual functioning (an IQ of about 70 or below, which is approximately two standard deviations below the mean), (2) accompanied by related limitations in adaptive functioning, (3) the onset of which occurs prior to the age of 18. *See Ex parte Brisenio*, 135 S.W.3d 1, 6-7 (Tex. Crim. App. 2004). Although a new framework has been adopted (DSM-5), the three prongs required for a diagnosis of intellectual disability are essentially the same.

As such, writ counsel announced at the beginning of the evidentiary hearing that Applicant would be abandoning his claim of intellectual disability. (WRR3: 17).

- (119) Based on Applicant's abandonment of this claim, the Court recommends that ground two be dismissed.
- (120) Alternatively, the Court finds that the record does not support a finding that Applicant is intellectually disabled.
- (121) Prior to trial, the defense team obtained funding from this Court and retained several mental health experts to assist them in their preparation and presentation of evidence during Applicant's capital murder trial.
- (122) Dr. Compton, the defense team's mitigation specialist, examined Applicant's Dallas Independent School District ("DISD") records and conducted the Texas Functional Living Scales. Dr. Compton also interviewed several of Applicant's family members and friends. None of these individuals expressed concerns about Applicant's intellectual or adaptive functioning during his childhood or adolescent years. (WRR4: 141, 200).
- (123) Applicant's DISD records showed school failure and "a lot of truancy." (WRR4: 200). Dr. Compton testified that low grades and tests scores are not enough, in and of themselves, to indicate intellectual disability. (WRR4: 201-02).
- (124) Although there were two notations regarding special education in the DISD records, there was no indication that Applicant was ever referred to special education or that an assessment was ever done. (WRR4: 202). There is also no indication that IQ testing was ever conducted during Applicant's time in DISD. (WRR4: 203).
- (125) The first IQ score seen in Applicant's records is a score of 91 on the Culture Fair Intelligence Test ("CFIT"), which was administered to Applicant after he entered the juvenile system. Dr. Compton explained that the CFIT is designed to measure fluid intelligence, one's capacity to learn without the influence of education or socioeconomic status. (WRR4: 203-04). Applicant's CFIT score of 91 was accepted as his IQ score throughout his duration in the juvenile system, and the records do not indicate that any of the teachers or counselors ever questioned the accuracy of this IQ score. (WRR4: 200-05).

- (126) The CFIT is the only IQ test administered to Applicant during the developmental period.
- (127) The Court finds that Applicant's CFIT score of 91 does not meet the first prong of intellectual disability, which requires an IQ score of about 70 or below.
- (128) Nonetheless, trial counsel retained Dr. Martinez, a forensic neuropsychologist, to evaluate Applicant's intellectual and cognitive functioning. Dr. Martinez administered the Wechsler Adult Intelligence Scale-Fourth Edition ("WAIS-IV"). This test reflected that Applicant has a full-scale IQ ("FSIQ") of 76. Considering the 95% confidence interval and standard error of measurement, this score represents a range of 72-81. (DE 11; AWE 23).
- (129) Counsel also retained experts Dr. Vigen and Dr. Gripon, both of whom are qualified to evaluate an individual for intellectual disability. (WRR3: 185-87; WRR8: 6-7, 19). Additionally, both of these experts have experience in death penalty litigation and know the significance of such a diagnosis. (WRR3: 185; WRR8: 19-20). Neither of these experts opined that Applicant is intellectually disabled. (WRR3: 184-85; WRR8: 11-12; AWE 38).
- (130) The Court finds that Applicant's FSIQ score of 76, adjusted for the standard error of measurement, yields a range of 72-81. Because even the lowest end of this score does not fall at or below 70, Applicant does not meet the first prong of intellectual disability.
- (131) Additionally, the Court finds that there is insufficient evidence of deficits in either intellectual functioning or adaptive functioning during Applicant's adolescent years. As such, the Court finds that Applicant does not meet the third prong of intellectual disability, onset during the developmental period.
- (132) The Court finds that Applicant does not meet all three of the diagnostic criteria for a diagnosis of intellectual disability.
- (133) The Court concludes that this claim is without merit and recommends that the relief requested in ground two be denied.

GROUND 3: MENTAL IMPAIRMENTS

- (134) In his third ground for relief, Applicant contends that his neurological and cognitive impairments make him ineligible for the death penalty under the reasoning in *Atkins v. Virginia* and *Roper v. Simmons*, 543 U.S. 551 (2005). See Writ Application at 78-90.
- (135) The Court finds that Applicant has failed to prove this claim by a preponderance of the evidence.
- (136) The highest criminal court in Texas has expressly declined to extend the *Atkins* ruling to the mentally ill. See *Mays v. State*, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010), cert. denied, 131 S. Ct. 1606, 179 L. Ed. 2d 506 (2011). In so holding, the court specifically noted there is no authority from the Supreme Court suggesting that mental illness is enough to render one exempt from execution under the Eighth Amendment. *Id.* at 379.
- (137) The Fifth Circuit has also refused to extend *Atkins* to claims of mental illness. See *ShisInday v. Quarterman*, 511 F.3d 514, 521-22 (5th Cir. 2007); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006); *In re Woods*, 155 Fed. Appx. 132, 136 (5th Cir. 2005).
- (138) Applicant has cited no cases from any United States jurisdiction that has held that the *Atkins* rationale applies to the mentally ill. Indeed, to the contrary, numerous federal and state courts have expressly declined to extend *Atkins* to the mentally ill. See *Carroll v. Secretary, DOC, FL*, 574 F.3d 1354, 1369 (11th Cir. 2009); *Baird v. Davis*, 388 F.3d 1110, 1114-15 (7th Cir. 2004); *Johnston v. State*, 27 So.3d 11, 26-27 (Fla. 2010); *Commonwealth v. Baumhammers*, 960 A.2d 59, 96-97 (Penn. 2008); *State v. Ketterer*, 855 N.E.2d 48 (Ohio 2006); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Hall v. Brannan*, 670 S.E.2d 87 (Ga. 2008); *Lewis v. State*, 620 S.E.2d 778, 786 (Ga. 2005); *State v. Johnson*, 207 S.W.3d 24, 51 (Mo. 2006); see also *Coleman v. State*, No. W2007-02767-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 36, 2010 WL 118696 (Tenn. Crim. App. Jan. 13, 2010) (not designated for publication); *Johnson v. Comm.*, No. 2006-SC-000548-MR, 2008 Ky. Unpub. LEXIS 13, 2008 WL 4270731 (Ky. Sept. 18, 2008) (not designated for publication). Thus, the Texas holding is harmonious with the rationale of other jurisdictions.

- (139) Applicant also makes no attempt to apply the rationale employed by the Supreme Court in *Atkins* to explain why its ruling should be extended to the mentally ill. Most notably, he does not allege or prove that there is a trend among state legislatures to categorically prohibit the imposition of capital punishment against mentally ill offenders. *See Atkins*, 536 U.S. at 312 (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)) (stating that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures).
- (140) Further, Applicant has not shown that he suffered from some mental impairment at the time of these murders so severe as to categorically and necessarily render him less morally culpable than those who are not mentally ill. *Id.* at 379-80.
- (141) An individualized sentencing determination is the bedrock of the Eighth Amendment. *See Jurek v. Texas*, 428 U.S. 262, 271 (1976). Article 37.071 of the Texas Code of Criminal Procedure permits the jury in a capital case to consider a defendant's mental illness as a mitigating factor, thus providing the individualized determination that the Eighth Amendment requires in capital cases. *See Tex. Code Crim. Proc. Ann. art 37.071, §§ (2)(d)(1), (2)(e)(1).*
- (142) The Court finds there is no Eighth Amendment violation in this case.
- (143) The Court concludes that this claim is without merit and recommends that the relief requested in ground three be denied.

GROUND 6-9: CHALLENGES TO TEXAS'S DEATH PENALTY STATUTE

Statutory Limitation on Mitigating Evidence

- (144) In his sixth ground for relief, Applicant contends that Texas' death penalty statute unconstitutionally limits the categories of evidence a capital jury may find mitigating. *See Writ Application* at 99-104.
- (145) Article 37.071 of the Texas Code of Criminal Procedure requires the trial court to instruct the jury that, if the jury answers the future-dangerousness special issue affirmatively, it shall then answer the following issue:

“Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant,

there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.”

Tex. Code Crim. Proc. Ann. Art. 37.071, § 2(e)(1).

- (146) The trial court is also required to instruct the jury that in answering this issue, it “shall consider mitigating evidence to be evidence that a juror *might* regard as reducing the defendant’s moral blameworthiness.” Tex. Code Crim. Proc. Ann. Art. 37.071, § 2(f)(4) (emphasis added).
- (147) The Court gave these required jury instructions in the punishment-phase jury charge. (CR2: 403).
- (148) Applicant claims the foregoing instruction is unconstitutional because no definition of “moral blameworthiness” is provided and because the avenues of mitigation are unconstitutionally limited to evidence that relates solely to the defendant’s culpability, the nature of his crime, and what the crime says about the defendant. Applicant further argues that the statutory instructions precluded jurors from considering mitigating evidence unrelated to his “moral blameworthiness,” a limitation wholly at odds with three decades of Supreme Court precedent.
- (149) This claim was raised in a pretrial motion and overruled by the Court. Applicant then raised this and many other challenges to Texas’s death penalty statute on direct appeal and his claims were again rejected. *See Muhammad*, 2015 WL 6749922, at *41. Therefore, this claim is not cognizable in this habeas proceeding. *See Ex parte Reynoso*, 257 S.W.3d 715, 723 (Tex. Crim. App. 2008) (a claim that was raised and rejected on direct appeal is not cognizable on habeas review under art. 11.071).
- (150) To the extent that Applicant is raising a new challenge to Texas’s death penalty statute that was not previously raised, this claim is procedurally barred. *See Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001) (citing *Ex parte Bagley*, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974)) (the writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal).
- (151) Even if this Court were to address Applicant’s barred complaint about the statutory mitigation instruction, it is without merit.

- (152) The Texas Court of Criminal Appeals has addressed this issue many times and has repeatedly held that the statutory mitigation instruction does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness. *See, e.g., Lucero v. State*, 246 S.W.3d 86, 96 (Tex. Crim. App. 2008); *Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2004); *Cantu v. State*, 939 S.W.2d 627, 648-49 (Tex. Crim. App. 1997); *King v. State*, 953 S.W.2d 266, 274 (Tex. Crim. App. 1997); *Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996).
- (153) Applicant has presented no new evidence or arguments that merit reconsideration of this well-settled area of law.
- (154) The Court finds that the statutory mitigation instruction did not violate Applicant's constitutional rights.
- (155) The Court finds that Applicant was not prejudiced by the statutory mitigation instruction.
- (156) The Court concludes that this claim is without merit and recommends that the relief requested in ground six be denied.

10-12 Rule

- (157) In his seventh ground for relief, Applicant challenges that constitutionality of what is commonly called the "10-12 rule." Specifically, he contends that his constitutional rights were violated when the trial court was prohibited from instructing the jury that a vote by one juror would result in a life sentence. *See* Writ Application at 104-10.
- (158) This claim was raised in a pretrial motion and overruled by the Court. Applicant then raised this and many other challenges to the 10-12 rule on direct appeal and his claims were again rejected. *See Muhammad*, 2015 WL 6749922, at *41. Therefore, this claim is not cognizable in this habeas proceeding. *See Reynoso*, 257 S.W.3d at 723.
- (159) To the extent that Applicant is raising a new complaint regarding the 10-12 rule, this claim is procedurally barred. *See Boyd*, 58 S.W.3d at 136.

- (160) Even if this Court were to address Applicant's barred complaint about the constitutionality of the 10-12 Rule, it is without merit.
- (161) The Texas Court of Criminal Appeals has addressed this issue many times and has repeatedly held that there is no constitutional violation in failing to instruct jurors on the effects of their individual answers. *See, e.g., Prystash v. State*, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999); *McFarland v. State*, 928 S.W.2d 482, 519 (Tex. Crim. App. 1996); *Pondexter v. State*, 942 S.W.2d 577, 586 (Tex. Crim. App. 1996); *Lawton v. State*, 913 S.W.2d 542, 558-59 (Tex. Crim. App. 1995).
- (162) Applicant offers no new evidence or arguments that merit reconsideration of this well-settled area of law.
- (163) The Court finds that the 10-12 rule did not violate Applicant's constitutional rights.
- (164) The Court finds that Applicant was not prejudiced by the 10-12 rule.
- (165) The Court concludes that this claim is without merit and recommends that the relief requested in ground seven be denied.

Future-Dangerousness Special Issue

- (166) In his eighth ground for relief, Applicant contends that his death sentence was arbitrarily and capriciously assigned based on the jury's answer to the unconstitutionally vague first special issue. *See* Writ Application at 111-15.
- (167) The first special issue, commonly referred to as the future-dangerousness special issue, requires the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *See* Tex. Code Crim. Proc. Ann. art. 37.071, §2(b)(1).
- (168) This claim was raised in a pretrial motion and overruled by the Court. Applicant then raised this and other challenges to Texas's death penalty statute on direct appeal and his claims were again rejected. *See Muhammad*, 2015 WL 6749922, at *41. Therefore, this claim is not cognizable in this habeas proceeding. *See Reynoso*, 257 S.W.3d at 723.

- (169) To the extent that Applicant is raising a new complaint regarding the future-dangerousness special issue, this claim is procedurally barred. *See Boyd*, 58 S.W.3d at 136.
- (170) Even if this Court were to address Applicant's barred complaint about the future-dangerousness special issue, it is without merit.
- (171) The Texas Court of Criminal Appeals has repeatedly rejected the claim that the future-dangerousness special issue is unconstitutionally vague. *See, e.g., Saldano v. State*, 232 S.W.3d 77, 91 (Tex. Crim. App. 2007); *Sells v. State*, 121 S.W.3d 748, 767–68 (Tex. Crim. App. 2003); *Murphy v. State*, 112 S.W.3d 592, 606 (Tex. Crim. App. 2003).
- (172) Applicant offers no new evidence or arguments that merit reconsideration of this well-settled area of law.
- (173) The Court finds that the future-dangerousness special issue did not violate Applicant's constitutional rights.
- (174) The Court finds that Applicant was not prejudiced by the future-dangerousness special issue.
- (175) The Court concludes that this claim is without merit and recommends that the relief requested in ground eight be denied.

Prosecutorial Discretion

- (176) In his ninth ground for relief, Applicant contends that his death sentence is unconstitutional because it was assigned based on Texas' arbitrary system of administering the death penalty. Specifically, he argues that the prosecutorial discretion established under Texas' system, and the geographic and racial disparities that have resulted from that discretion, creates an impermissible arbitrariness in capital sentencing that violates his rights under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. *See* Writ Application at 115-24.
- (177) The "arbitrariness" of Texas' death penalty scheme was raised prior to trial and rejected by this Court, as well as raised and rejected on direct appeal. *See*

Muhammad, 2015 WL 6749922, at *41. As such, it is not cognizable in this proceeding. *See Reynoso*, 257 S.W.3d at 723.

- (178) To the extent that Applicant is asserting a new claim that was not previously raised, it is procedurally barred. *See Boyd*, 58 S.W.3d at 136.
- (179) Even if this Court were to address Applicant's barred claim, it is without merit.
- (180) Applicant acknowledges that Texas' death penalty statute has been upheld by the United States Supreme Court. *See Jurek*, 428 U.S. at 273-74. However, he argues that because of the prosecutorial discretion established under Texas' system, a vast minority of Texas counties are responsible for a sizable majority of death sentences assessed over the last thirty-six years since *Jurek* was decided. He argues that geographic and racial disparities resulting from this discretion have created an arbitrary system of capital punishment.
- (181) The Texas Court of Criminal Appeals has repeatedly upheld the prosecutorial discretion established under Texas' system and rejected the argument that a disparity in death-penalty decision making from county to county violates the U.S. Constitution. *See, e.g., Roberts v. State*, 220 S.W.3d 521, 535 (Tex. Crim. App. 2007); *Crutsinger v. State*, 206 S.W.3d 607, 611-13 (Tex. Crim. App. 2006); *Threadgill v. State*, 146 S.W.3d 654, 672 (Tex. Crim. App. 2004); *Rayford v. State*, 125 S.W.3d 521, 534 (Tex. Crim. App. 2003).
- (182) Applicant offers no new evidence or arguments that merit reconsideration of this well-settled area of law.
- (183) Moreover, Applicant killed his two young children as an act of revenge. The prosecution's decision to seek the death penalty in this case was not arbitrary.
- (184) The Court finds that Applicant has not shown that any part of the punishment-phase jury instructions were unconstitutional.
- (185) The Court finds that Applicant has not shown that he was harmed by any punishment phase jury instructions.
- (186) The Court concludes that this claim is without merit and recommends that the relief requested in ground nine be denied.

OTHER CLAIMS

- (187) The Court finds that all residual claims are procedurally barred.
- (188) Under article 11.071, § 4(a), Applicant was required to file his original habeas application “not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state’s original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.” Tex. Code Crim. Proc. Ann. art. 11.071, § 4(a). An Applicant may obtain one 90-day extension from the trial court for good cause shown. *Id.* art. 11.071, § 4(b). Any grounds available to an applicant before the deadline for the original application that are not raised until after the deadline are considered waived. *Id.* art. 11.071, § 4(e).
- (189) This Court appointed OCFW as Applicant’s writ counsel on June 7, 2013.
- (190) The State filed its brief on direct appeal on February 3, 2015, making Applicant’s original habeas application due on March 20, 2015.
- (191) OCFW filed an unopposed motion for a 90-day extension on February 5, 2015, which was granted by this Court, making the application due on June 18, 2015. The application was timely filed.
- (192) Any claim that was asserted in this proceeding that was not raised in Applicant’s original habeas application would constitute a subsequent writ that must meet the requirements of article 11.071, § 5.
- (193) Unless and until Applicant obtains review pursuant to the process set out in article 11.071, § 5, any such claims are procedurally barred and should be dismissed.

CONCLUSION

- (194) The Court concludes that Applicant has not been denied any rights guaranteed him by the United States and Texas Constitutions.
- (195) The Court concludes that Applicant’s Application for Writ of Habeas Corpus is without merit and recommends that all relief requested be denied.

JOHN CREUZOT
Criminal District Attorney
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Respectfully submitted,

/s/ Jaclyn O'Connor Lambert
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of these proposed findings of fact and conclusions of law were served on Applicant's attorney, Carlotta Lepingwell, Carlotta.Lepingwell@ocfw.texas.gov, by electronic service on June 28, 2019.

/s/ Jaclyn O'Connor Lambert
JACLYN O'CONNOR LAMBERT

EX PARTE

NAIM RASOOL MUHAMMAD

IN THE CRIMINAL DISTRICT

COURT NO. 4

DALLAS COUNTY, TEXAS

**ORDER ADOPTING STATE'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The Court adopts and incorporates the above proposed findings of fact and conclusions of law submitted by the State in *Ex parte Naim Rasool Muhammad*.

THE CLERK IS **ORDERED** to prepare a transcript of all papers in cause number W11-00698-K(A) and to transmit same to the Texas Court of Criminal Appeals as provided by article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:


1. Applicant's Original Application for Writ of Habeas Corpus and any other pleadings filed by Applicant, including any exhibits;
2. The State's Answer to Applicant's Original Writ Application and any other pleadings filed by the State;
4. Any proposed findings of fact and conclusions of law filed by the State and Applicant;
5. This Court's signed findings of fact, conclusions of law, and order;
6. Any and all orders issued by the Court; and
7. The indictment, judgment, docket sheet, and appellate record, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of this Court's signed findings of fact and conclusions of law to Applicant's counsel, Carlotta Lepingwell,

Office of Capital and Forensic Writs, 1700 Congress Ave, Suite 460, Austin, TX 78701,
Carlotta.Lepingwell@ocfw.texas.gov, and to counsel for the State, Jaclyn O'Connor
Lambert, Assistant Criminal District Attorney, Frank Crowley Courts Bldg., 133 N.
Riverfront Blvd., LB-19, Dallas, TX 75207-4399, Jaclyn.OConnor@dallascounty.org.

SIGNED the 21st day of November, 2019.

NOV 21 2019



Judge Dominique Collins
Criminal District Court No. 4
Dallas County, Texas